

of a domestic altercation. FM-A telephoned the individual from the jailhouse and requested that the individual contact FM-A's longtime domestic partner (FM-B), an alleged victim of the domestic altercation, and talk to her about dropping the charges against FM-A. On the same evening, the individual reached FM-B by telephone and had a conversation with her. Still later that evening, FM-A initiated a second telephone call from the jailhouse to the individual and the individual reported the results of his telephone conversation with FM-B. Both telephone calls from the jailhouse were recorded in accordance with the customary practices of the jail. *See* Exhibit 12. Approximately one month later, the individual was arrested and charged with two felonies for violating state statutes prohibiting (1) bribery or intimidation of a witness and (2) extortion. *See* Exhibit 8 and Exhibit 9.

The individual promptly self-reported his arrest to the local security office (LSO) in compliance with DOE security regulations. *See* Exhibit 8. As a result of this information, the LSO conducted a personnel security interview (PSI) with the individual in April 2017. *See* Exhibit 12. The PSI did not resolve the security concerns arising with respect to the individual's arrest.

Subsequently, the LSO informed the individual in a letter dated September 25, 2017 (Notification Letter), that it possessed reliable information that created substantial doubt regarding his eligibility to hold a security clearance. In the Notification Letter, the LSO explained that the derogatory information raised one or more security concerns under "Guideline J: Criminal Conduct" of the Adjudicative Guidelines (Guideline J).² *See* Exhibit 1.

Upon his receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations by requesting an administrative review hearing. *See* Exhibit 2. The Director of the Office of Hearings and Appeals (OHA) appointed me the Administrative Judge in the case and, subsequently, I conducted an administrative hearing in the matter. At the hearing, the LSO introduced 13 numbered exhibits into the record and presented no witnesses. The individual, represented by counsel, introduced four lettered exhibits (Exhibits A, D, F and G)³ into the record and presented the testimony of four witnesses, including that of himself.

The exhibits will be cited in this Decision as "Ex." followed by the appropriate numeric or alphabetic designation. The hearing transcript in the case will be cited as "Tr." followed by the relevant page number.⁴

II. Regulatory Standard

² See Section III below.

³ Prior to the hearing, the individual submitted three additional exhibits, which had been labelled Exhibit B, Exhibit C and Exhibit D. At the commencement of the hearing, the individual moved to withdraw those three exhibits and that motion was granted. Transcript at 8-9.

⁴ OHA decisions are available on the OHA website at www.energy.gov/oha. A decision may be accessed by entering the case number in the search engine at www.energy.gov/oha.

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the regulations require me, as the Administrative Judge, to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all of the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). The regulatory standard implies that there is a presumption against granting or restoring a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

III. The Notification Letter and the Security Concerns at Issue

As previously noted, the LSO cited Guideline J as the basis for suspending the individual's security clearance. Guideline J relates to security risks associated with criminal conduct. Criminal activity creates doubt about a person's judgment, reliability and trustworthiness because, by its very nature, such conduct calls into question a person's ability or willingness to comply with laws, rules and regulations. See *Adjudicative Guidelines at Guideline J ¶ 30*. With respect to Guideline J, the LSO cited the individual being arrested and ultimately charged in March 2017 with two third-degree felonies: Bribery of a Witness and Extortion. Ex. 1 at 1.

In light of the information available to the LSO, the LSO properly invoked Guideline J.

IV. Findings of Fact

The LSO initially became aware that the individual had been arrested and charged with two third-degree felonies through the individual's self-disclosure. The accuracy of that information was not contested at the hearing. Where the record contained inconsistencies, I have carefully considered the totality of the individual's testimony, the entirety of the written record (including the transcript of the PSI), and the arguments presented by both the individual and the LSO in reaching the findings of fact set forth below.

In February 2017, the individual was contacted by telephone by FM-A, who was in jail following his arrest for a domestic altercation with FM-B (and perhaps others). During that conversation, which was recorded by the local jail in accordance with its customary practices, the individual agreed to contact FM-B, an alleged victim of the domestic altercation, on behalf of FM-A and suggest that she drop the charges against FM-A. Ex. 9 at 2; Ex. 12 at 11, 21.

Shortly thereafter the individual telephoned FM-B and during that conversation communicated the following: that they were going to hire an attorney to defend FM-A; the attorney would bring up things that did not need to be brought up, including a lot of FM-B's "secrets, a lot of her skeletons, stuff that ... [the individual is] sure [that FM-B is] not proud of" [*Id.* at 17]; and that it would come out in court that FM-B had engaged in behavior on the night of the altercation that she should not have, including that she provided alcohol to her underage son. *Id.* at 18. During the telephone conversation, FM-B agreed that she would go to the authorities and drop the charges against FM-A. Tr. at 64.

Later that same evening, FM-A telephoned the individual from the jail and the individual informed FM-A about his conversation with FM-B. Ex. 12 at 19-20. This conversation was also recorded by jailhouse officials. *Id.* at 21.

Approximately one month after these telephone conversations, the individual was arrested and charged with two felonies. At the individual's initial court appearance, one of the original charges was dismissed and an additional charge was added. Ultimately, the individual was charged with Bribery of a Witness (Threats – False Testimony) and Extortion. Both are third-degree felonies. Ex. 8 at 2; Ex. 9 at 4.

In September 2017, the individual entered into a Pre-Prosecution Diversion Program (PPDP) with respect to the two charges. The successful completion of such program will result in the dismissal of the charges against the individual and the possible expungement of the charges from the individual's criminal record. Ex. A at 2. The agreement executed by the individual with respect to the PPDP recites that the individual has voluntarily admitted in writing that he is guilty of the two charges. *Id.* at 1.

The individual entered into the PPDP for the long-term career advantages of the expungement of the charges and because he did not want to risk the uncertainties of a trial on the charges. Tr. at 70-75. As of the date of the hearing, the individual was still participating in the PPDP and was in compliance with all of the terms of his PPDP agreement. *Id.* at 85.

V. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been

guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c)⁵ and the Adjudicative Guidelines. After due deliberation, I have determined that the individual's access authorization should not be restored at this time. I cannot find that restoring the individual's DOE security clearance will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

A. Mitigation Arguments

In mitigation of the Guideline J security concerns alleged with respect to his criminal conduct, the individual argues that: (1) FM-B had not felt intimidated by his conversation with her; and, therefore, he did not commit any crime and (2) he no longer associates with the extended family members involved in these activities and, therefore, is no longer under the same pressure that he felt when he engaged in the telephone conversations with FM-A and FM-B. *See* Adjudicative Guidelines at Guideline J ¶ 32(b) and (c). For these reasons, the individual argues that he has sufficiently mitigated the security concerns noted by the LSO under Guideline J.

B. Administrative Judge Evaluation of Evidence

The Adjudicative Guidelines do not require that one be charged, prosecuted or convicted in order for security concerns to arise under Guideline J where there is evidence of criminal conduct. Adjudicative Guidelines at Guideline J ¶ 32(b). In this case, the individual has not only been charged with two third-degree felonies, but has subsequently acknowledged his guilt on those charges in a PPDP agreement. While the individual argues that he entered the PPDP as a convenience in order to move forward with his life, he also testified that his decision to enter the PPDP was to eliminate the risk of a guilty verdict if he went to trial. That the individual had doubts as to the outcome of any criminal trial reinforces the security concerns under Guideline J. The individual being charged and acknowledging his guilt in the PPDP agreement sufficiently establishes that the individual engaged in criminal conduct. Further, it is disingenuous for the individual to avail himself of the advantages he hopes to derive from the PPDP, then four months later ask the DOE to ignore the provisions of the PPDP agreement that disadvantage him in a Part 710 administrative proceeding.

The individual argues that FM-B has stated that she did not feel threatened or intimidated by him during their telephone conversation. He also argues that his intent was merely to inform her of the likely course of events if the case against FM-A proceeded to trial. However, during the PSI, the individual acknowledged telling FM-B in their telephone conversation that: they were going to hire an attorney to defend FM-A; the attorney would

⁵ Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding the conduct, to include knowledgeable participation, the frequency and recency of the conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or reformation and other pertinent behavioral changes, the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

bring up things that did not need to be brought up, including a lot of FM-B's "secrets, a lot of her skeletons, stuff that ... [the individual is] sure [that FM-B is] not proud of" [Ex 12 at 17]; and it would come out in court that FM-B had engaged in behavior on the night of the altercation that she should not have, including that she provided alcohol to her underage son. *Id.* at 18. These statements all seem to fall with the relevant criminal statutes which prohibit: (1) intimidating or threatening any witness or person likely to become a witness in any judicial proceeding for the purpose of preventing such testimony (Ex. F at 1); and (2) threatening to accuse a person of a crime, threatening to expose any deformity or disgrace of a person, or threatening to expose the secrets of another (*Id.* at 2). Even if such behavior did not violate the relevant statutes, the individual agreeing to contact the alleged victim of a domestic altercation on behalf of the accused perpetrator reflects a lack of good judgment and reliability and is inconsistent with the behavior expected of holders of access authorization.

The individual also argues that, to the extent that he engaged in criminal conduct, he has mitigated the security concerns as a result of his discontinuing contact with extended family members who engage in criminal or questionable conduct. While I accept that the individual has altered his conduct so that he no longer associates with members of his extended family, this is insufficient to resolve the Guideline J security concerns. The focus of mitigation under the Adjudicative Guidelines is demonstrating that the disqualifying conduct is unlikely to recur. At hearing, I referred the individual to his statements during the PSI describing his telephone conversation with FM-B (summarized in the preceding paragraph) and asked if he could see how his statements appear as an attempt to influence FM-B. His response was that "at no point in time was I trying to influence her." Tr. at 89. I believe that the individual's response reflects an unacceptable lack of insight into the situation that led to his arrest. Without requisite insight into the behavior that triggered criminal charges being brought against him, I cannot conclude that such behavior by the individual is unlikely to recur. *Contra.* Adjudicative Guidelines at Guideline J ¶ 32(a).

For the reasons set forth above, I find that the individual has not resolved the security concerns associated with Guideline J arising with respect to criminal conduct.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Guideline J. After considering all of the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I have found that the individual has not brought forth sufficient evidence to resolve the security concerns associated with Guideline J. Accordingly, I have determined that the individual's access authorization should not be restored at this time. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Wade M. Boswell

Administrative Judge
Office of Hearings and Appeals